Perak River Estate Sdn Bhd & Anor v Mohd Asrul bin Omar (suing through his father and representative, Omar bin Yusof) & Ors

HIGH COURT (TAIPING) — CIVIL SUIT NO 12NCVC-17–9 OF 2014
MOHAMED ZAINI MAZLAN JC
15 JUNE 2015

Tort — Damages — Settlement as to quantum of damages — Liability — Quantum — Collision between car and train — Plaintiff came to private crossing — Gate at crossing was up and plaintiff drove through — Train smashed into plaintiff's car — Plaintiff suffered severe head injuries and has since been bed-ridden and totally dependent for self-care — Sessions court allowed plaintiff's claim and apportioned liability of 10% against first and second defendants and 90% against third and fourth defendants — Appeal against decision of sessions court

This case concerned a claim arising out of a collision between a car and a train. The plaintiff was the driver of the car while the first defendant was the driver of the train, with the second defendant being the owner of the train and also employer to the second defendant, the fourth defendant was the gateman to the private crossing, and finally the third defendant, was the employer to the fourth defendant, and also owner of the land where the private crossing was situated. The plaintiff was driving his car from Kuala Kangsar headed towards Padang Rengas. At around 1.45am, the plaintiff came across the private crossing at km 118.25. This private crossing was situated on the third defendant's land and manned by its employee, namely the fourth defendant at that time. A private crossing is provided for under s 19 of the Railways Act 1991, where one may with conditions, construct and open a private crossing at any place on a railway track and that annual rent is to be paid to the second defendant for this crossing. At the time of the accident, the gate at the crossing was up. The plaintiff then drove through. That proved to be fatal, as the oncoming train driven by the first defendant smashed into the plaintiff's car. The plaintiff suffered severe head injuries, and has since been bed ridden and totally dependent for self-care. The plaintiff, suing through his father, alleged that the defendants' negligence had caused the accident to occur, and sought for general and special damages. The sessions court allowed the plaintiff's claim and apportioned liability of 10% against the first and second defendants, and 90% against the third and fourth defendants. Arising from the sessions court's decision, the third and fourth defendants appealed against the liability and quantum, with the first and second defendants cross-appealing against liability,

and the plaintiff cross-appealing against the award pertaining to nursing care costs.

Held:

(1) It would take more than five minutes for the train to reach the crossing from the time he first heard it's horn being sounded. He had also in cross-examination, agreed that he had ample time to close the gates. There was as such more than sufficient evidence for a finding of negligence to be made against the fourth defendant (see para 27).

(2) Although the fourth defendant had testified that the plaintiff was speeding, there was no evidence to suggest or support his allegation. He also claimed that he had attempted to stop the plaintiff from crossing. He also testified that he had attempted to signal by hand to the first defendant to stop the train. The fourth defendant's attempt to exonerate himself was futile. It defied belief for him to have attempted to stop the plaintiff's car, and at the same time attempting to stop the train, more so if the car was speeding (see para 29).

(3) The first and second defendants' appeal against the finding of liability of 10% by the sessions court was allowed. The first defendant had in his testimony related the steps that he had taken, such as sounding the horn and relying on the fourth defendant's act of flashing his torchlight. The crossing was operated solely by the fourth defendant, and manned by the third defendant. The first defendant was entitled to rely on the fourth defendant, who was the gateman for the crossing. There was no evidence put to suggest that the first defendant had been negligent, and that the learned sessions court judge had clearly erred in failing to give judicial appreciation to the evidence produced (see para 31).

(4) The third and fourth defendants appeal against the finding of liability is dismissed, and the first and second defendants' appeal against liability was allowed. The plaintiff's appeal against quantum, which in particular was in respect of the costs of nursing care, was also dismissed. The appeal against the quantum by the third and fourth defendants was dismissed, save for the quantum in respect of the loss of income, which by consent of parties were reduced by RM24,431.53 (see paras 31 & 34).

[Bahasa Malaysia summary

Kes ini adalah berkaitan tuntutan berbangkit daripada perlanggaran di antara kereta dan keretapi. Plaintif adalah pemandu kereta sementara defendan pertama adalah pemandu keretapi, dengan defendan kedua sebagai pemilik keretapi dan juga majikan kepada defendan kedua, defendan keempat adalah penjaga pintu kepada lintasan peribadi tersebut dan akhirnya defendan ketiga, adalah majikan kepada defendan keempat, dan juga pemilik tanah di mana lintasan peribadi terletak. Plaintif sedang memandu keretanya dari Kuala

Kangsar menuju ke arah Padang Rengas. Pada kira-kira pukul 1.45 pagi, plaintif tiba di lintasan persendirian di 118.25 km. Lintasan peribadi ini terletak di tanah defendan ketiga dan dijaga oleh pekerjanya, iaitu defendan keempat pada ketika itu. Lintasan persendirian diperuntukkan di bawah s 19 Akta Keretapi 1991, bahawa seseorang boleh dengan syarat, membina dan membuka lintasan peribadi di mana-mana tempat atas landasan keretapi dan sewa tahunan hendaklah dibayar kepada defendan kedua untuk lintasan ini. Pada masa kemalangan tersebut, pintu pagar di lintasan tersebut terangkat. Plaintif kemudiannya memandu melaluinya. Itu membuktikan adalah fatal, kerana keretapi yang bergerak dari arah hadapan yang dipandu oleh defendan pertama melanggar kereta plaintif. Plaintif mengalami kecederaan kepala yang serius, dan semenjak itu telah terlantar di katil dan bergantung kepada penjagaan diri sepenuhnya. Plaintif, menyaman melalui bapanya, mendakwa bahawa kecuaian defendan-defendan telah menyebabkan kemalangan berlaku, dan memohon untuk ganti rugi am dan khas. Mahkamah sesyen membenarkan tuntutan plaintif dan membahagikan liabiliti sebanyak 10% terhadap defendan pertama dan kedua, dan 90% terhadap defendan keempat dan ketiga. Berbangkit daripada keputusan mahkamah sesyen, defendan ketiga dan keempat merayu terhadap liabiliti dan kuantum, dengan defendan pertama dan kedua merayu balas terhadap liabiliti, dan plaintif merayu balas terhadap award berkaitan kos penjagaan kejururawatan.

Diputuskan:

(1) Ia akan mengambil lebih daripada lima minit untuk keretapi tiba di lintasan dari masa dia pertama kali dengar hon dibunyikan. Dia juga dalam pemerikasaan balas, bersetuju yang dia mempunyai masa yang banyak untuk menutup pintu pagar. Terdapat lebih daripada keterangan yang mencukupi untuk dapatan kecuaian untuk dibuat terhadap defendan keempat (lihat perenggan 27).

(2) Walaupun defendan keempat telah memberi keterangan bahawa plaintif memandu dengan laju, tidak terdapat keterangan untuk mencadangkan atau menyokong dakwaannya. Dia juga mendakwa bahawa dia telah mencuba untuk memberhentikan plaintif daripada melintas. Dia juga memberi keterangan bahawa dia mencuba untuk memberikan isyarat dengan tangan kepada defendan pertama untuk memberhentikan keretapi. Percubaan defendan keempat melepaskan dirinya adalah sia-sia. Ia menentang kepercayaan untuknya untuk memberhentikan kereta plaintif, dan pada masa yang sama mencuba untuk memberhentikan keretapi, lebih lagi jika kereta sedang memecut (lihat perenggan 29).

(3) Rayuan defendan pertama dan kedua terhadap dapatan sebanyak 10% oleh mahkamah sesyen dibenarkan. Defendan pertama telah dalam keterangannya berkaitan langkah-langkah yang diambilnya, seperti membunyikan hon dan bergantung ke atas tindakan defendan keempat

memancarkan lampu suluhnya. Lintasan tersebut hanya dioperasi oleh defendan keempat, dan dijaga oleh defendan ketiga. Defendan pertama berhak untuk bergantung ke atas defendan keempat, yang adalah penjaga pintu pagar bagi lintasan tersebut. Tidak terdapat keterangan yang mencadangkan bahawa defendan pertama telah cuai, dan bahawa hakim mahkamah sesyen yang bijaksana telah secara jelas tersilap dalam kegagalan untuk memberi penghargaan kehakiman kepada keterangan yang dikemukakan (lihat perenggan 31).

(4) Rayuan defendan ketiga dan keempat terhadap dapatan liabiliti ditolak, rayuan defendan pertama dan kedua terhadap liabiliti dibenarkan. Rayuan plaintif terhadap kuantum, terutamanya berkaitan kos penjagaan kejururawatan, juga ditolak. Rayuan terhadap kuantum oleh defendan ketiga dan keempat ditolak, kecuali untuk kuantum berkaitan kehilangan pendapatan, yang mana atas izin pihak-pihak dikurangkan sebanyak RM24,431.53 (lihat perenggan 31 & 34).]]]]

Notes

For case on settlement as to quantum of damages, see 12(1) *Mallal's Digest* (5th Ed, 2015) para 357.

Cases referred to

Gan Yook Chin (P) & Anor v Lee Ing Chin @ Lee Teck Seng & Ors [2005] 2 MLJ 1, FC (refd)

Legislation referred to

Railways Act 1991 s 19

Manjit Singh (Manjit Subra & Assoc) for the appellants.
Harikannan Ragavan (Sandu & Assoc) for the first respondent.
Inderjeet Singh (Jayadeep Hari & Jamil) for the second and third respondents.

Mohamed Mazlan JC:

INTRODUCTION

[1] This case concerns a claim arising out of a collision between a car and a train, that occurred at a private crossing in Padang Rengas, Perak.

[2] The plaintiff was the driver of the car, the first defendant was the driver of the train, with the second defendant being the owner of the train and also employer to the second defendant, the third defendant was the gateman to the private crossing, and finally, the fourth defendant, was the employer to the third defendant, and also owner of the land where the private crossing was situated.

[3] The sessions court had at the conclusion of the trial, allowed the plaintiff's claim, and apportioned liability of 10% against the first and second defendant, and 90% against the third and fourth defendants.

[4] Arising from the sessions court's decision, the third and fourth defendants have appealed against the liability and quantum, with the first and second defendants cross-appealing against liability, and the plaintiff cross-appealing against the award pertaining to nursing care costs.

[5] I shall for ease of reference, refer to the parties in their capacity at the sessions court.

BRIEF FACTS

[6] On the fateful day of 6 September 2011, the plaintiff was driving his car from Kuala Kangsar headed towards Padang Rengas. At around 1.45am, the plaintiff came across the private crossing at km 118.25. This private crossing was situated on the third defendant's land and manned by its employee, namely the fourth defendant at that time. A private crossing is provided for under s 19 of the Railways Act 1991, where one may with conditions, construct and open a private crossing at any place on a railway track and that annual rent is to be paid to the second defendant for this crossing.

[7] At the time of the accident, the gate at the crossing was up. The plaintiff then drove through. That proved to be fatal, as the oncoming train driven by the first defendant smashed into the plaintiff's car. The plaintiff suffered severe head injuries,and has since been bed ridden and totally dependent for self-care.

[8] The plaintiff, suing through his father, alleged that the defendants'negligence had caused the accident to occur, and sought for general and special damages.

[9] The first and second defendants alleged that the accident was wholly caused by the negligence of the plaintiff, as he had among others, failed to ensure that it was safe to cross the private crossing. Similar to the first and second defendants, the third and fourth defendants also alleged that the accident was entirely due to the plaintiff's fault.

THE SESSIONS COURT'S DECISION

[10] The sessions court judge in allowing the plaintiff's claim, apportioned liability of 10% towards the first and second defendants, and 90% against the third and fourth defendants. The sessions court awarded the following:

(a) RM300,00 in general damages with interests of 5%pa from the date of the filing of the summons (23 February 2012) until the date of judgment (28 August 2014);

(b) RM1,000 in special damages with interests of 2.5%pa from the date of the accident (6 September 2009) until the date of judgment (28 August 2014);

(c) nursing costs of RM1,078,800 with no interests;

(d) RM246,887.04 for loss of income with no interests; and

(e) costs of RM57,890.

[11] I had after considering the submissions made by all parties, dismissed the third and fourth defendants' appeal and held them liable 100%, allowed the first and second defendant's appeal against the finding of 10% liability, and dismissed the plaintiff's appeal in respect of the award for nursing care costs. The third and fourth defendants have since appealed against the decision. I shall therefore address the third and fourth defendant's appeal in these grounds.

BRIEF FACTS

[12] The fourth defendant was employed by the third defendant as a gateman. A gateman is entrusted to operate a private crossing and to supervise it, including the passage of vehicles through the crossing. At the time of the accident, the fourth defendant was 78 years old. He had been employed by the fourth defendant for close to twenty five years.

[13] On the day of the accident, the fourth defendant, in his examination-in-chief, stated that he had only closed one of the two gates to the crossing. He saw the plaintiff's car approaching, and claimed to have attempted to stop him from crossing, but to no avail. He also testified that he did not shine this torch light at the oncoming train that night, but could not remember why.

[14] The first defendant, the train driver, testified that he would sound the train's horn about 20 minutes before reaching the crossing and that he would then sound it every three minutes. The fourth defendant confirmed that he had heard the train's horn being sounded. In fact, the fourth defendant under cross-examination, agreed that it would have taken five minutes for the train to reach the private crossing when the horn was sounded.

[15] On the night of the accident, the first defendant claimed that the fourth defendant had shone a torch light. This was corroborated by his assistant who had also testified. He also stated that he only became aware of the plaintiff's car when his assistant alerted him, and that the distance between the train and the

car was about 10 to 15 meters at that time. He was unable to stop the train from colliding with the plaintiff's car, as the train was travelling at the speed of about 50 to 60 km/h, and that it would take about a minute for the train to come to a complete stop had he activated the brakes.

[16] The investigating officer in his evidence stated that there were gates at the private crossing,and that there were no signal lights there. He also testified that there were no damages to the gates. This is consistent with the fact that the plaintiff had driven through the crossing when the gate was opened.

[17] An executive officer of the second defendant also testified. He confirmed that the private crossing was built on the third defendant's land under license from the second defendant. This crossing was to be operated by the third defendant, and that the third defendant pays the second defendant rental for this crossing. He also referred to an unsigned agreement between the second and third defendant pertaining to this crossing. This agreement regulates the terms pertaining to the use and operation of the private crossing ('the agreement'). Attached to this agreement were the 'Guidelines for gateman of a private cross' ('the guidelines').

[18] According to this witness, the second and third defendant had signed this agreement at the inception, but the agreement being one that requires to be renewed on a two-yearly basis, was not signed when it came for renewal. At the point the accident occurred, this agreement was not signed by the third defendant. Nevertheless, it is not in dispute that the third defendant had been operating the private crossing, and has been paying rental to the second defendant.

THE THIRD AND FOURTH DEFENDANTS' CASE

[19] The third and fourth defendants took issue with the learned sessions court judge's finding that the fourth defendant was not competent to carry out his task, by referring to the guidelines, as the agreement itself was not executed by the fourth defendant.

[20] The third and fourth defendants also contend that the learned sessions court judge erred in finding that the fourth defendant was negligent in failing to close one of the two gates, that resulted in the plaintiff crossing the railway track. They contend that the plaintiff was speeding, and that the fourth defendant was unable to close the gate on time.

FINDINGS

[21] The learned sessions court judge in his grounds, was of the view that the first defendant was not suited to do the job of manning the private crossing. He had referred to the terms of the unsigned agreement between the second and third defendant, where the guidelines for the gateman of theprivate crossing is supposed to be below the age of 56 years old. He had come to the conclusion that the fourth defendant being 78 years old at the material time, was unsuitable to carry out the job of a gateman.

[22] The learned sessions court judge in referring to the guidelines, also held that the fourth defendant was also not competent to be a gateman, as he did posses a medical certificate to certify that he had a good eyesight and hearing.

[23] As a conclusion, the learned sessions court judge held that the third defendant was negligent in employing the fourth defendant.

[24] On this finding, I am in agreement with the third and fourth defendants. The learned sessions court judge was clearly wrong in referring to the guidelines. It is not disputed that the third defendant had entered into an agreement with the second defendant in respect of the private crossing, and that the agreement requires to be renewed every two years. It is also not disputed that the second and third defendants did not execute subsequent agreements for renewal. Nevertheless, the second and third defendants have continued its contractual relationship up to the date of the accident.

[25] Having perused the notes of proceedings, I find that there was no evidence submitted to prove that the third defendant is liable to adhere to the terms of the agreement, and in particular the guidelines. It is therefore erroneous for the learned sessions court judge to have relied on the terms in the guidelines, and in doing so made a finding that the fourth defendant was incompetent.

[26] However, this was not the sole basis for the learned sessions court judge's finding of negligence against the fourth defendant. He had analysed the fourth defendant's testimony in detail. For instance, he noted that the fourth defendant testified that the train concerned had sounded its horn about half a mile before reaching the crossing, and that it would take about two to three minutes for the train to reach the crossing. The fourth defendant had even disagreed with the plaintiff's suggestion that this was not ample time for him to close the gate. This according to the learned sessions court judge, proves that the fourth defendant had ample time, and was able to close both gates.

[27] Although this point was not addressed by the learned sessions court

judge in his grounds, I would further add that the fourth defendant had also in cross-examination stated that it would take more than five minutes for the train to reach the crossing from the time he first heard it's horn being sounded. He had also in cross-examination, agreed that he had ample time to close the gates. There is as such more than sufficient evidence for a finding of negligence to be made against the fourth defendant.

[28] Nevertheless, the fourth defendant admitted that he was not able to close one of the two gates. The learned sessions court judge concluded that this failure was clearly an act of negligence by the fourth defendant. He had made a finding of fact. In my considered view, his finding was based on an appreciation of sound evidence.It is trite law that an appellate court, such as the High Court here, should not interfere with a finding of fact by a trial judge unless the latter had failed to properly evaluate the factual evidence; *Gan Yook Chin (P) & Anor v Lee Ing Chin @ Lee Teck Seng & Ors* [2005] 2 MLJ 1.

[29] I would also add, that although the fourth defendant had testified that the plaintiff was speeding, there was no evidence to suggest or support his allegation. He also claimed that he had attempted to stop the plaintiff from crossing. He also testified that he had attempted to signal by hand to the first defendant to stop the train. I am of the view that the fourth defendant's attempt to exonerate himself was futile. It defies belief for him to have attempted to stop the plaintiff's car, and at the same time attempting to stop the train, more so if the car was speeding.

[30] The learned sessions court judge had also considered the testimony by the first defendant, namely the train driver and his assistant. Both testified that they saw the fourth defendant flashing his torchlight, indicating that it was safe to continue. Their testimony on this point, I noted, had not been shaken nor credibly disputed. The fourth defendant on the other hand, could not remember. The learned sessions court judge, in my view, had correctly chose to accept the first defendant's testimony which was corroborated by his assistant. He had outweigh this part of the evidence against that of the fourth defendant, who could not recall.

[31] On this point, I had for this reason, allowed the first and second defendant's appeal against the finding of liability of 10% by the sessions court. The first defendant had in his testimony related the steps that he had taken, such as sounding the horn and relying on the fourth defendant's act of flashing his torchlight. The crossing was operated solely by the fourth defendant, and manned by the third defendant. In my considered opinion, the first defendant was entitled to rely on the fourth defendant, who was the gateman for the crossing. There was no evidence put to suggest that the first defendant had been negligent, and that the learned sessions court judge had clearly erred in failing

to give judicial appreciation to the evidence produced.

QUANTUM

[32] On the award of RM246,887.04 for loss of income to the plaintiff, all parties have consented to only nineteen months of the plaintiff's salary to be awarded. His salary was RM1,285.97 per month. After deduction, the award stands at RM24,431.53.

[33] As for the award of RM1,078,800 for nursing costs at home, this was based on the sum of RM2,900 monthly, which according to the learned sessions court judge in his ground, was an agreed quantum by all parties. I take this to be the agreed quantum for nursing care at home, after having perused the written submission by all parties after trial. The third and fourth defendants had in their submissions, agree with this amount. The first and second defendants however have taken issue with this amount. The plaintiff on the other hand had appealed against this decision, and is seeking for costs of nursing care at a medical institution. I will not elaborate on this point, as the plaintiff had not sought to appeal against my decision in dismissing his appeal. I would nevertheless in abundance of caution, add that I had come to this decision after taking into consideration the testimony by the plaintiff's father that he would rather care for the plaintiff at home.

[34] In conclusion, the third and fourth defendants appeal against the finding of liability is dismissed, and the first and second defendants' appeal against liability is allowed. The plaintiff's appeal against quantum, which in particular is in respect of the costs of nursing care, is also dismissed. The appeal against the quantum by the third and fourth defendants is dismissed, save for the quantum in respect of the loss of income, which by consent of parties are reduced by RM24,431.53.

Order accordingly

Reported by Afiq Mohammad Noor